IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1971

No. 71-1005

Supreme Court, U. S.
FILED
JAN 22 1973
MICHAEL RODAK, JR., CLERK

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEMON PAYNE,
Respondent.

PETITIONER'S
APPENDIX OF [illegible] ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MICHIGAN

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Jan. 26, 1970	Decision Granting Leave to Appeal to Michigan Supreme Court
Feb. 7, 1972	Petition for Certiorari to United States Supreme Court
Oct. 16, 1972	Order Granting Certiorari
Dec. 18, 1972	Motion for Reduction of Pre-sentence Report Denied.

ARRAIGNMENT TRANSCRIPT
(Filed January 3, 1963)

1 (1)

People of the State of Michigan

vs.

LeRoy Payne, Respondent

Case No. X-751 Dated December 14, 1962
Action: Arraignment

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Frederick Lake, Assistant Pros. Atty.
Atty. Philip A. Brown, Atty. for Respondent

MR. LAKE: May it please the court, this is the matter of the People of the State of Michigan versus LeRoy Payne. here on an information charging the crime of assault with intent to commit murder. This is the Court's Docket X-751.

Mr. Payne is represented in court by his attorney, Mr. Brown, of St. Joseph, and the record will show that a preliminary examination was had on this charge, and in the Municipal Court for the City of Benton Harbor, and that the respondent was bound over to this court to answer to this information.

(2)

Mr. Brown, will you waive further reading of this information at this time?

MR. BROWN: Respondent waives further reading of the information at this time, your Honor.

I have gone over the elements of this offense with the respondent quite extensively. I have explained to him his various rights; his right to a jury trial; his right to plead guilty to the offense; his right to plead not guilty. I have also explained to him the maximum penalty, upon a conviction, of this crime.

We have had a preliminary examination on this charge, and the People have shown probable cause here, and he was bound over.

I have also explained to him that regardless of any promises of any kind, of leniency, as to entering a plea of guilty, this was in no one's control but the court, and that the maximum penalty was life, or any term of years, for a conviction under this charge, and I have explained, as I said, the various rights to the respondent, under the constitution and the statutes, and the respondent has advised me that he wishes to tender a plea of guilty to this offense at this time.

THE COURT: Mr. Payne, you have heard what your counsel has said? Is that a correct statement (3) of the facts?

THE RESPONDENT: Yes, sir.

THE COURT: In this case, due to the publicity that I have read, which may or may not be true, I want to be very careful that you understand exactly what you are doing, and that you are not doing it because of any reason other than that you are guilty.

I take it from the examination and from your counsel that the People can prove you guilty of this charge beyond a reasonable doubt, without any use of an alleged confession that was included in the case, as I understand it. Is that correct?

THE RESPONDENT: Yes.

THE COURT: In other words, I am informed that there was a positive identification by the victim, by Victor Yost, or another officer that was with him, of your identification. Do you understand that to be the fact?

THE RESPONDENT: Yes, sir.

THE COURT: And is that the fact?

THE RESPONDENT: Yes, sir.

THE COURT: I also have been informed that you signed a confession to this crime, but that before you signed it you received some physical harm at the hands (4) of somebody, but that you have stated that you do not wish that to be considered in this matter, is that correct?

THE RESPONDENT: Yes, I'm pleading guilty because I am guilty, and I'm sorry about it.

THE COURT: That comes up later. If the court is satisfied to accept your plea of guilty, then that part about your reformation, if any, comes at a later date, and is taken into consideration by the court in passing sentence, or possibly taken into consideration. There is nothing that you can be sure of, if your plea is accepted, except that you'll be sentenced in some manner by the court for this crime, to which you are pleading guilty.

I don't know as you have stated on the record that you do plead guilty. Is that true?

THE RESPONDENT: I do plead guilty, sir.

THE COURT: Did you, on the 5th day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it isn't so alleged — and that you then and there intended to kill and murder?

THE RESPONDENT: Yes.

THE COURT: Nobody has promised you leniency or threatened you, to get you to plead guilty? (5) And you are pleading guilty because you did do that?

THE RESPONDENT: I have been threatened, sir, but it's not because of these threats that I'm pleading guilty.

THE COURT: You had threats, but you are not pleading guilty because you were threatened, is that correct?

THE RESPONDENT: Yes.

THE COURT: And nobody has promised you that you'll get a shorter sentence because you are pleading guilty, than if you pleaded not guilty? Is that correct? Nobody has promised you that you'll get a shorter sentence?

THE RESPONDENT: Well, sir, I mean I have talked to so many policemen and all. They said that it would be likely that if I did cooperate that —.

THE COURT: Now, if anybody has told you, or if you are of the opinion that you may get a shorter sentence if you plead guilty than you'd get if you pleaded not guilty, that's wrong. That will have no bearing on the sentence

of the court. At least it won't if I do it, and I think I'll probably be the one that does it.

Do you understand me now?

(6)

THE RESPONDENT: Yes, sir.

THE COURT: It doesn't make any difference to me whether you plead not guilty or guilty. In fact I can't accept a plea of guilty until I'm convinced that you are guilty, and you are the only one that can convince me now, because we can't try the case here today. We simply are trying to find out what you want to do, and your counsel has stated — and I'm sure he wouldn't state it if it wasn't true — that he has told you that you have a right to a trial, a jury trial, and he told you all these rights, and you understand that?

THE RESPONDENT: Yes.

THE COURT: You don't want a jury trial, and you want to plead guilty, is that correct?

THE RESPONDENT: Yes.

THE COURT: You want to plead guilty because you are guilty?

THE RESPONDENT: Yes.

THE COURT: Very well. The court feels the plea of guilty is freely, voluntarily and understandingly made, without undue influence, compulsion or duress, and without promise of leniency, and it is therefore accepted.

You are remanded to the custody of the sheriff to (7) await sentence.

The probation officer of this court will convey to the court anything that you wish the court to know, before sentence is pronounced. It will take several days, maybe weeks, to complete the case in the probation department, so that I may have the proper information before sentence is pronounced.

That's all.

SENTENCE TRANSCRIPT
(Filed March 19, 1963)

(1)

People of the State of Michigan vs. LeRoy Payne, Case No. X-751, Dated March 8, 1963. Action: Sentence.

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Philip A. Brown, Atty. for Respondent

THE COURT: Mr. Payne, you are before the court for sentence, having pleaded guilty to assault with intent to murder.

I have talked with your counsel. I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of the People versus Lionel Bradford. I have, I think, all the facts that I need, in mind.

Do you have anything to say, or does your counsel have anything further to say? I have already talked with him, of course.

(2)

THE RESPONDENT: I'd like to say, your Honor, that I am sorry. I know that I was wrong.

THE COURT: I understood that that was your position.

MR. BROWN: I have nothing further to convey to the court, your Honor, having already talked to you.

THE COURT: Very well.

Starting with your honorable discharge from the U.S. Army in 1960 — from then on, according to your own admissions, you have been the type of citizen, or were the type of citizen, until the time you committed this crime, that would, to my mind, require elimination from society from now on.

If there is any distinction at all between superlatives, the assault of an individual with intent to murder is very

bad; assault with intent to murder a policeman is worse, if, as I say, if there is any distinction between superlatives, because that's not only an attack upon the individual, it's an attack upon society; an attack upon a representative of society as a whole.

As I say, from that side of the picture it would require, in my opinion, your complete elimination from (3) society.

Now, on the other side of the question, you have voluntarily admitted — if I remember the number correctly — eighteen breakings and enterings prior to this time, or maybe including the one that you had committed just before you committed this crime.

According to your testimony, several representatives of society were guilty of unpardonable actions in connection with their treatment of you. Now, at least some of those could possibly be explained, if not excused, by the fact, that you had shot a deputy sheriff with intent to kill him. However, you have been importuned quite strongly, as I understand it, by representatives of your race, and your own mother, that they should be prosecuted for their actions in that connection, and you have stated, according to my information, that you made a mistake, and you are asking forgiveness for that, and that they made a mistake, and that you are willing to forgive them their mistake.

I am also reliably informed, and have come to the conclusion myself, that the normal reaction we get from prisoners who are awaiting sentence, that they are going to get religion. In your case I feel it's an honest one, which quite frequently it's not. At least I have (4) become convinced of that.

The sentence that I am about to impose on you will give you hope of returning to society after a — what I consider a reasonable length of time, providing that you are honestly desirous of reformation and have a change of these past actions that you have been guilty of since you got out of the army, and that you are intelligent enough to become a useful member of society after you have paid your debt to it.

I am also informed — maybe not reliably — that the two gentlemen against whom you gave testimony, name-

ly Charles Hawkins and Lionel Bradford, have made threats upon your life, or if not that, upon causing you physical injury, so I recommend to the prison authorities that you be not incarcerated in the same place that they are, or at least not where you will come in contact with them, or they with you.

If I'm correctly informed, and I'm quite sure I am, the sentence I am about to impose on you will permit you to be subject to parole approximately ten years from this date, which will give you an opportunity, if you take advantage of the time that the statute gives you, and the extra good time that you can acquire in the penitentiary, of returning to society, assuming that you do (5) convince them, also, that you are that type of individual that should be turned loose in society.

It is the judgment of this court that you be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan, Township of Blackman, County of Jackson, under the provisions of the Michigan Code of Criminal Procedure, and the Michigan Penal Code, and the amendments thereto.

I fix the minimum term of such imprisonment at nineteen (19) years from and after this date. I fix the maximum of such term at forty years (40) from and after this date.

You are remanded to the custody of the sheriff for transmittal to Jackson.

ORDER SUPPRESSING CONFESSION
(Filed June 21, 1967)

At a session of said Court held in the Court House in the City of St. Joseph in said County on this 15th day of June 1967.

Present: Honorable Chester J. Byrns, Circuit Judge.

This matter having come on to be heard upon the Order of the Court of Appeals dated May 12, 1967, in the matter

of the People of the State of Michigan, Plaintiff-Appellee vs. LeRoy Payne, Defendant-Appellant, No. 3207 which the Court of Appeals remanded this cause to the Circuit Court for the County of Berrien to assume jurisdiction and to make a determination upon a separate record of the voluntariness of the confession and of the plea of guilty by defendant on December 14, 1962 and that in the event the Court found the confession and plea of guilty to be involuntary, that the Court enter an order vacating the sentence and plea of guilty and that the defendant be rearraigned and required to plead anew to the information.

The People having appeared by Assistant Prosecuting Attorney Harry J. Creager and the Defendant-Appellant having appeared in person and by his attorney Philip A. Brown and the Court having considered all of the testimony and evidence introduced at said hearing and being fully advised in the premises,

IT IS ORDERED that any confessions, admissions or other statements against interest, either verbal, written or stenographic during the period from the time of the Defendant-Appellant's arrest on November 5, 1962, through December 14, 1962 inclusive be and the same are hereby suppressed as being involuntary.

IT IS FURTHER ORDERED that Defendant-Appellant's sentence and plea of guilty heretofore made and entered in these proceedings be and the same are hereby vacated and are null and void.

IT IS FURTHER ORDERED that this cause be and the same hereby is remanded to the Municipal Court for the City of Benton Harbor for a preliminary examination together with such other and further proceedings which may properly come for said Court.

IT IS FURTHER ORDERED that Defendant-Appellant's bond on said charge is hereby fixed at $10,000.00.

(s) Chester J. Byrns
Circuit Judge

APPROVED:

John T. Hammond, Prosecuting Attorney
By: (s) Harry J. Creager,
Assistant Prosecuting Attorney

Business Address:
County Building
St. Joseph, Michigan

ORDER FOR CHANGE OF VENUE
(Filed August 9, 1967)

At a session of said Court held at the Court House in the City of St. Joseph on this fourth day of August, 1967.

Present: Hon. Chester J. Byrns, Circuit Judge.

This cause having come on to be heard upon the Motion of the Respondent, LeRoy Payne, for a change of venue, said Motion having attached thereto the affidavit of the respondent together with exhibits, the respondent having appeared in person and by his attorney Philip A. Brown and the People having appeared by Prosecuting Attorney John T. Hammond and the Court having considered the argument of counsel and the Court being fully advised in the premises:

IT IS ORDERED that Respondent's Motion for Change of Venue be and the same hereby is granted and said cause and the issues raised thereby shall be tried in the Circuit Court for Kent County, Michigan and the Clerk of the Court is directed to transmit all records in said cause to said Court for a trial by jury on the charge of assault with intent to murder.

(s) Chester J. Byrns
Circuit Judge

ATTEST:

(s) Mary Burns
Clerk, Dep.

Approved:

(s) John T. Hammond
Prosecuting Attorney

Business Address:
Court House
St. Joseph, Michigan

TRANSCRIPT OF SENTENCE
(Filed September 8, 1967)

(1)

People of the State of Michigan vs. LeRoy Payne. Case No. X-751. Date 30 August 1967. Action: Sentence.

Appearances:

Hon. Chester J. Byrns, Circuit Judge
Atty. Philip Brown, Atty. for Respondent

THE COURT: This is the matter of the People of the State of Michigan versus LeRoy Payne here on a conviction of guilty to the crime of assault with intent to commit murder, which verdict was rendered in Kent County, on the request of the Defendant for a Change of Venue to get a jury that might have and did have no connection whatsoever with any local media of communications. With Mr. Payne is his attorney, Mr. Philip Brown, of St. Joseph, Michigan. Mr. Brown, is there any reason why sentence cannot be pronounced at this time?

MR. BROWN: I know of no reason, Your Honor. I previously conferred with the Court regarding sentence.

(2)

THE COURT: Mr. Payne, is there any reason why I should not pronounce sentence now?

THE RESPONDENT: No, sir.

THE COURT: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence. Is there anything further that you wish to say?

I would like to note that I have discussed this with the officer making the pre-sentence investigation as well. Is there anything further that I should consider before pronouncing sentence — any circumstances you wish me to consider?

THE RESPONDENT: I have nothing to say, Your Honor.

THE COURT: Mr. Payne, you are living proof of the tremendous rights given under our law to protect the innocent even though at times, such rights may shield the guilty. You have enjoyed rights and you will enjoy them hereafter, which the average man who would have to pay his own way could not afford.

First, you have been furnished counsel, Mr. (3) Philip Brown of St. Joseph, who has done an outstanding job on your behalf and you have good reason to know, not only from his relentless efforts in getting an appeal to win you a new trial, but, as I think the record of trial itself will show, he did an excellent job in your defense in the three days that we were in Grand Rapids.

Second: On an appeal brought by you, the Michigan Court of Appeals sent this case back to Berrien County to hear your complaint about the police handling of you following the arrest which caused your confession and plea of guilty to be non voluntary.

Third: Because there was some question as a result of the handling of you by a few officers following your arrest, which we trust will never happen again in this County, they gave you every benefit of the doubt. Your guilty plea was set aside and your confession was suppressed. You were granted a new trial at which any mention of confession of guilty plea was prohibited by this Court. Since there was within this County various news and radio media who had published facts of your

(4) guilty plea and of your confession, there was a possibility that an absolutely impartial jury might not be found and a motion for a change of venue was granted for trial only, and the trial at considerable expense to the County was transferred to Kent County and there convened for three days with myself as presiding judge.

Fifth: At this three day trial, the jury was prohibited from reading or hearing any news that might possibly concern the trial. As a matter of fact, we prohibited them from reading the newspapers and we prohibited them from listening to their radios or television sets. In addition, at that trial, you got all of the benefits of law, instructions to the jury, including those instructions given on presumption of innocence on your part and the duty of the prosecution to prove your guilt beyond a reasonable doubt by all twelve of the jurors. And finally, today, after your conviction — and I will give you your sentence in a minute or two — you will still have a right to appeal at public expense if you so desire.

Mr. Payne, in presiding over your three day trial (5) I want to tell you that without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all

of society because law and order cannot (6) exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police officer in line of duty. I have felt since I have been judge that crime of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an Authority, Mr. Reporter, People versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291.

(7)

THE COURT: In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one-half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.

I am not setting a larger sentence that what I will set in a few minutes because you appealed or because of any added work or expense of a new trial. This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful

than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. The larger sentence which I impose here is based on the nature of the crime and on the impressions which I (8) formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude. Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

THE COURT: Administrative — company punishment?

THE RESPONDENT: Yes, sir.

THE COURT: But you did receive an honorable discharge?

THE RESPONDENT: Yes, sir.

(9)

THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.

These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment.

The maximum term of imprisonment set by statute for the crime for which you have been found guilty is any term of years up to life imprisonment. I sentence you to be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan in the township of Blackman, County of Jackson, State of Michigan, to be confined at such penal institutions of the State as it shall direct, under the provisions of the Michigan Code of Criminal Procedure and the Michigan Penal Code, and the State Department of Corrections and amendments thereto for a minimum of twenty-five years and a maximum of (10) fifty years from and after this date. Let the record show in connection with this offense, that between the time that Mr. Payne was arrested and today, he has been detained either in the Berrien County jail or in State Prison since November 6, 1962. That was the date that he was arrested, is that right Mr. Brown?

MR. BROWN: November 5th, Your Honor.

THE COURT: November 5th, 1962, and he shall especially receive credit on this sentence both maximum and minimum for all of that period of time which our clerk here will compute on the commitment papers and which of course the Corrections Commission is aware of. In addition, the good time he has earned by credit while in State Prison will also be applied to him whether or not, Mr. Payne, you go towards your maximum or not as you know depends on your contacts while in prison.

I inform you that as a matter of your constitutional rights, you are entitled to an appellate review, that is, a review by a court higher than this, of your conviction. If you are not financially able to afford counsel for such an appeal, and you desire to appeal, this court will appoint for you without charge to you, and further such (11) counsel will be furnished such portions of the proceedings had in your case as counsel requires to prepare any post-conviction motions or to perfect an appeal.

If you wish such assistance of counsel, you must complete these forms which I now give you and file a copy of each with the court within 60 days from now and you

must also give a copy of each to the office of Prosecuting Attorney of this County.

Will you please acknowledge receiving in duplicate an Affidavit of Financial Condition, Form 6404 and Petition for Appellate Counsel, 6402. Have you received them?

THE RESPONDENT: Yes, I have.

THE COURT: Any bond previously authorized in this case is cancelled and the Defendant is remanded to the Sheriff of Berrien County for the execution of sentence. That's all.

AFFIDAVIT OF JUDGE BYRNS

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"I. I am and have been since January 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Michigan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three

days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged

with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He

said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan, as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the defendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"

AFFIDAVIT IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs. No. 71-1005

LEROY PAYNE,
Respondent.

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1. I am and have been since January 1, 1967, one of the Judges of the Second Judicial Circuit of Michigan (Berrien County).

2. I am the same person who executed at the request of the Supreme Court of Michigan on May 10, 1971, an affidavit relative to my participation in the case of the People v Leroy Payne and the same judge who sentenced Leroy Payne to 25 to 50 years.

3. In recently reexamining said affidavit, it appears that I could have noted in paragraph 6 that Judge Hadsell also had some limited opportunity to see and hear Mr. Payne when he testified as a witness for the prosecution against his accomplice or codefendant, Lionel Bradford, and admitted his personal involvement in the shooting of the two police officers, as more particularly set forth in paragraphs 9 and 10 of said affidavit.

4. Further, by way of supplement to said affidavit, this court did receive and study prior to sentencing Mr. Payne a supplemental pre-sentence report which it cannot under the present Michigan law make public, but which a higher court than this one can order produced.

Chester J. Byrns

County of Berrien

ss.

State of Michigan

On this 29th day of November, 1972, before me personally appeared Chester J. Byrns, one of the judges of the Second Judicial Circuit, who, being duly sworn, did acknowledge that he did sign the above affidavit by him made and that the same was true to the best of his knowledge and belief.

Ronald H. Smith
Notary Public, Berrien County, Michigan.
My commission expires March 5, 1976

Supreme Court of the United States

No. 71-1005 ---October Term, 19--

Michigan,

Petitioner,

v.

Leroy Payne

Order allowing certiorari. *Filed* October 16 ----- , 19 72.

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan *is granted.*